COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

Investigation by the Department on its own Motion into the Appropriate Regulatory Plan to succeed Price Cap Regulation for Verizon New England Inc. d/b/a Verizon Massachusetts' intrastate retail telecommunications services in the Commonwealth of Massachusetts	)	D.T.E. 01-31 Phase II (Track A)

OPPOSITION OF VERIZON MASSACHUSETTS
TO AT&T MOTION FOR SUMMARY JUDGMENT

The Department should deny AT&T's Motion for Summary Judgment filed with the Department on December 13, 2002 ("AT&T Motion"). AT&T already has attempted unsuccessfully at least three times to argue the same positions before the Department. AT&T's Motion is a transparent attempt to delay the issuance of a Department decision on Verizon Massachusetts' ("Verizon MA") Compliance Filing of June 5, 2002, and an improper and untimely effort to reverse the Department's Order on Clarification of the *Phase I Order*, in which the Department clearly and explicitly rejected AT&T's principal arguments here. *Order on Attorney General's Motion for Reconsideration and Motion for Extension of the Judicial Appeal Period, and AT&T Communications of New England, Inc.'s Motion for Clarification*, D.T.E. 01-31-Phase I-A (August 5, 2002) ("Order on Clarification"). Accordingly, Verizon MA will not reargue here issues that have either already been decided by the Department or are otherwise now ripe for decision in Phase II of these proceedings.

Moreover, AT&T's claim that there are issues that must be explored through further hearings is plainly wrong. AT&T had its opportunity in Phase I of this case and failed to prevail on claims it raises in its Motion. As part of Phase II of these proceedings, the Department has,

where appropriate, permitted discovery, evidentiary hearings and briefs. AT&T has submitted written comments regarding Verizon MA's Compliance Filing, as well as detailed responses to Department Information Requests DTE-ATT 2-1 and DTE-ATT 2-2 (requesting AT&T to explain its position concerning the contestability of Verizon MA's retail Business services). AT&T has been given a full opportunity to present its positions. There is no basis for further hearings to explore matters that the Department has already decided. The case is now ripe for a Department decision on Verizon MA's Compliance Filing, and AT&T's last minute procedural gambit to derail a Department decision should be soundly rejected.

I. AT&T'S MOTION DIRECTLY CONFLICTS WITH THE DEPARTMENT'S ESTABLISHED PROCEDURAL FRAMEWORK FOR THIS CASE.

A. History of the Proceedings

This proceeding began on February 27, 2001, when the Department opened an investigation to review the appropriate regulatory framework governing Verizon MA's intrastate retail telecommunications services given the termination of the Department's Price Cap Plan. *Vote and Order To Open Investigation*, D.T.E. 01-31. On April 12, 2001 Verizon MA filed its proposed Alternative Regulation Plan accompanied by the direct testimony of Robert Mudge, Paula L. Brown and Dr. William E. Taylor. The Department bifurcated the proceeding into consecutive phases, undertaking an investigation in the first phase of whether there is sufficient competition in Massachusetts to permit market-based pricing flexibility for Verizon MA's retail services. *See Interlocutory Order on Scope*, at 18, D.T.E. 01-31 (June 21, 2001).

The Department issued its decision in Phase I on May 8, 2002. *Phase I Order* (2002). In the *Phase I Order*, the Department concluded based on extensive record evidence that "there is sufficient competition in the Massachusetts business marketplace to grant Verizon [MA] pricing flexibility for its business services." *Id*., at 91.

> The CLEC share of the business market using resale, UNEs, and facilities-based provisioning is supported by substantial evidence (Exh. VZ-3A; RR-DTE-2A) (footnote omitted). All three methods of entry are present and providing competitive pressure in the market. Furthermore, while each specific method of entry into the telecommunications market entails its own costs and benefits (*e.g.*, resale incurs no sunk costs, but also does not allow for innovation), the combination of methods of entry provide sufficient competition to ensure that prices for business services will remain just and reasonable.

Id. at 91-92.[1]

In response to the Department's findings and directives in the *Phase I Order*, Verizon MA made a Compliance Filing on June 5, 2002. The filing consisted of a regulatory plan that implemented the Department's determination in the *Phase I Order* that Verizon MA should have pricing flexibility for most retail Business services (except those described as price regulated, *i.e.*, private line services), subject to any price floor requirement set by the Department.

On August 1, 2002, the Hearing Officer issued a Memorandum proposing a two-track procedural schedule for Phase II (*i.e.*, evaluation of the Compliance Filing). The *Hearing Officer Memorandum* separated Phase II into Track A and Track B as follows:

> Track A will evaluate Verizon [MA]'s compliance with our directives in the *Phase I Order* concerning Verizon [MA]'s retail business services; Track B will investigate the appropriate regulatory treatment of Verizon [MA]'s retail residential services and Verizon [MA]'s proposed service quality plan. Parties that wish to propose alternative procedural schedules must file their proposed schedules by August 15, 2002.

Hearing Officer Memorandum, at 1 (August 1, 2002).

The *Hearing Officer Memorandum* also included a proposed procedural schedule and requested parties to propose alternative procedural schedules by August 15, 2002. The Attorney

[1] The Department also found that its grant of pricing flexibility to Verizon MA for its retail Business services is consistent with its statutory mandate under G.L. c. 159 to ensure just and reasonable rates for telecommunications services in Massachusetts. *Id*., at 93.

General and AT&T submitted alternative schedules, and the Department held a procedural conference on August 22, 2002. The Department issued a final schedule on the same day. On August 27, 2002, the Attorney General appealed the procedural schedule concerning certain Track B issues. On September 3, 2002, the Department issued *Interlocutory Order on Appeal of the Attorney General of Hearing Officer's Ruling on the Procedural Schedule* denying the Attorney General's appeal. In the *Interlocutory Order*, the Department noted that "[n]o party has appealed Track A of the procedural schedule . . .". *Interlocutory Order*, at 2, n.2.

B. The Department Rejected the Identical AT&T Arguments in Phase I

AT&T argues that the Department should grant summary judgment and reject Verizon MA's Compliance Filing because Verizon MA failed to show that retail Business services are contestable using UNEs (AT&T Motion, at 5). According to AT&T, Verizon MA's restriction on EEL and commingling prevent CLECs from using UNEs to compete with Verizon MA for Business services (*id*., at 7). AT&T made these same arguments in Phase I (*see* Exh. ATT-3 and Exh. ATT-6) and again in its Motion for Clarification of the *Phase I Order* (*see* AT&T Motion for Clarification, at 5-9). AT&T made them for a third time in Phase II in the context of AT&T's request for an alternative procedural schedule (*see* AT&T's Proposed Schedule for Phase II and Comments in Support, at 2-3). In each case, the Department rejected AT&T's arguments. Having lost three times, AT&T now seeks summary judgment based on the same claims. This constitutes an abuse of process and should be rejected by the Department.

In AT&T's Motion for Clarification, AT&T argued that "Verizon [MA]'s UNE use restrictions, and Verizon [MA]'s prohibition against commingling access services and UNEs on the same facilities should not be considered denied with prejudice because they were not addressed in the *Phase I Order.*" Order on Clarification, at 13. The Department unequivocally disagreed and found that these issues "should not be part of Phase II". *Id*., at 14.

Instead, the Department found that AT&T did provide evidence in Phase I "on both UNE use restrictions (*see* Exh. ATT-3), and commingling prohibitions (*see* Exh. ATT-6)." *Id*. The Department rejected AT&T's Motion for Reconsideration.

> We will begin our discussion by looking at AT&T's arguments on UNE use restrictions (Exh. ATT-3) and commingling prohibitions (Exh. ATT-6). **Our evaluation of the sufficiency of competition for Verizon [MA]'s retail business services was completed in Phase I with the issuance of the *Phase I Order*.** In Phase I, we conducted a comprehensive evaluation of the state of competition and concluded that with the safeguards enumerated in the *Phase I Order*, Verizon [MA] could be granted pricing flexibility for its retail business services. *Phase I Order*, at 89-95. It is Verizon [MA]'s compliance with the safeguards and conclusions reached in the *Phase I Order*, as shown in Verizon [MA]'s filing of June 5, 2002, that will be the subject of Phase II, not the taking of further evidence and argument on how additional issues affect competition for Verizon [MA]'s retail business services (footnote omitted). **As a result, both AT&T's UNE use restriction argument and commingling argument, which both concern competition for Verizon [MA]'s retail business services, will not be part of Phase II.**

Id., at 14-15 (emphasis added). Notably, the Department also rejected AT&T's argument that AT&T had refrained in Phase I from presenting "comprehensive evidence and argument" on these issues in the understanding that they would be the subject of Phase II. *Id*., at 15.

> First, the Department made clear that the first phase of this proceeding consisted of an investigation into the state of competition for the services for which Verizon [MA] sought pricing flexibility (*i.e.*, retail business services as identified in Verizon [MA]'s April 12, 2001 Proposed Plan). *See June 21 Interlocutory Order* at 16-17. The *June 21 Interlocutory Order* positively stated what the investigation would comprise. It was not necessary (indeed, it would have been impossible) to catalogue what was not included. Second, throughout Phase I, the Department gave the parties a full opportunity to provide, and the parties did provide, evidence and argument on a wide-ranging array of issues that affect competition for business services in Massachusetts. **That AT&T did provide evidence on UNE use restrictions and commingling prohibitions in Phase I argues**

against, rather than supports, AT&T's request for inclusion of those issues in the second phase of the proceeding.

Id., at 15-16 (emphasis added).

Despite the Department's *Order on Clarification*, AT&T sought to revive these same issues when the schedule for Phase II was proposed by the Hearing Officer. AT&T argued that it should be permitted to introduce testimony in Phase II on which retail Business services AT&T is not able to contest "because it cannot obtain UNEs" (Tr. 1, at 22 (August 22, 2002)). *See also* AT&T's Proposed Schedule for Phase II and Comments in Support, at 2 (August 15, 2002). The Hearing Officer rejected AT&T's arguments, allowing only for discovery of Verizon MA's compliance with the *Phase I Order*. *See* Procedural Schedule, August 22, 2002. Thus, the fact that AT&T doggedly refuses to accept – but one that the Department has repeatedly confirmed – is that the *Phase I Order* determined the issue of the ability of CLECs to compete with Verizon MA for Business services (except Private Line service) through the use of UNEs.[2]

C. AT&T's Request for Additional Evidentiary Hearings Is Without Merit and Should be Rejected

AT&T argues that if the Department does not grant AT&T's Motion, it should "establish a schedule of hearings so that all evidence related to these issues may be presented as sworn testimony subject to cross examination and an evidentiary record established . . ." (AT&T

[2] AT&T cites to a Department footnote in the *Phase I Order* directing Verizon MA to identify in its Phase II filing those Business services, if any, that are not contestable on a UNE basis, arguing that Verizon MA "has never explained" how CLECs can use UNEs to provide competing services in the face of UNE restrictions (AT&T Motion, at 5). AT&T's reading of this footnote is plainly wrong as the Department's *Order on Clarification* makes clear. The Department considered a wide range of factors, including UNE restrictions, in making its determination in the *Phase I Order* that most of Verizon MA Business services were competitive. Moreover, Verizon MA's Compliance Filing fully satisfied the Department's request, indicating that "[w]ith the exception of administrative charges (*e.g.*, dishonored check charges, late payment charges, *etc.*, which are charges that a CLEC can apply to their own customers), all of Verizon MA's retail Business services can be replicated by competitors via UNEs." Verizon MA Phase I Compliance Filing, at 8. Verizon MA's Reply Comments also provided an extensive record refuting AT&T's argument that Verizon MA did not support its claim that all Business services (other than administrative services) are contestable using UNEs (Verizon MA Reply Comments, at 12-17 (July 16, 2002)).

Motion, at 3). As described above, the Department has already heard and rejected AT&T's position on AT&T's alleged inability to compete with Verizon MA for Business services in the *Phase I Order and the Order on Reconsideration*. The request for additional hearings similarly was rejected at the outset of Phase II by the Hearing Officer. AT&T did not appeal the Hearing Officer's determination on how the Department would evaluate Verizon MA's Compliance Filing relative to Business services. Only now when the case is ripe for a Department decision does AT&T raise a complaint. AT&T has clearly waived any objection to the process established for determining Verizon MA's compliance.

D. Contrary to AT&T's Assertion, Verizon MA Has Rebutted Each and Every AT&T Argument

The inference AT&T's Motion obviously seeks to create is that Verizon MA has remained virtually mute throughout the Phase II proceeding by failing to answer AT&T's charge that it is unable to use UNEs to compete with Verizon MA for Business services in Massachusetts (*see* AT&T Motion, at 22-28). Notwithstanding the fact that the Department has already rejected AT&T's contention that UNE use restrictions and commingling prohibitions are a barrier to sufficient competition, the Phase II record contains substantial information establishing that AT&T's claims are wrong. For example, AT&T maintains that Verizon MA has "never explained" in this proceeding how CLECs can use UNEs under their existing use restrictions to provide competitive retail Business services (AT&T Motion, at 5).[3] To the

[3] To bolster its position, AT&T maintains that "Verizon's own E911 data of CLEC local exchange listings in Massachusetts show that the vast majority of the CLEC listings… are served over special access circuits and not over UNEs" (Motion at 2). It later conducts an analysis of E911 data provided by Verizon MA in Phase I that purportedly supports this claim (*id*., at 20-22). AT&T's analysis is fatally flawed. Verizon MA acknowledged that the services associated with CLEC E911 listings can be served via UNEs, Special Access, or full CLEC facilities. (Exh. VZ-8, at 7 (Phase I); Exhibit ATT-VZ 2-1 (Phase I)). However, the E911 records themselves carry no indication of the facilities used to deliver the service (Exh. ATT-VZ 2-1 (Phase I)). Any attempt to allocate the number of records based on the type of facility used to deliver the service is pure speculation (Exh. VZ-8, at 6-8 (Phase I)). Moreover, AT&T focuses only on services delivered via UNEs and Special Access facilities. The analysis improperly ignores business services that are delivered by CLECs using their own facilities. AT&T attempts to gloss over this fact by stating that

contrary, Verizon MA provided a detailed discussion together with network diagrams explaining how AT&T and other CLECs *can and do* use UNEs to provide Business services (Verizon MA Reply Comments, at 12-17; *see also* Verizon MA response to DTE Supplemental Request, at 1-9 (October 7, 2002) ("Supplemental Response").

Likewise, AT&T maintains that Verizon MA's "no facilities, no build policy" interferes with using UNEs to contest Verizon MA's Business services (AT&T Motion, at 13). As explained in detail in Verizon MA's Supplemental Response, AT&T's argument ignores the fact that the absence of available facilities for use as UNEs would place AT&T, or any other CLEC requesting such facilities, in exactly the same competitive position as Verizon MA (Verizon MA Supplemental Response, at 9-12). If a facility does not exist in Verizon MA's network, it does not exist for Verizon MA, AT&T or any other carrier (*id.*, at 11).[4] There is no discrimination by Verizon MA when investigating and determining the availability of facilities.

Similarly, AT&T contends that Verizon MA's provisioning of UNE-L to CLECs does not permit AT&T to compete with Verizon MA because of alleged UNE provisioning problems attributable to the current hot cut process (AT&T Motion, at 14-17). AT&T made the same argument in Phase I, which the Department squarely rejected (*see* AT&T Reply Brief, at 14-17

Verizon MA "never identified full facilities based CLECs offering local business services that could account for any of those 470,000 CLEC lines" (AT&T Motion, at 20). This claim, however, ignores the testimony of AT&T's own witness, Mr. Fea, who testified that AT&T's "preferred method, referred to as "Type I" provisioning, provides service entirely on AT&T facilities." In addition, in docket D.T.E. 01-34, WorldCom also acknowledged that its preferred method of serving customers is via its own full facilities: "WorldCom looks first to its own facilities to serve a customer." (Exh. WCOM 1, at 7 (D.T.E. 01-34)). In short, AT&T's claim is unsupported by the record, and nothing more than an effort to introduce new facts even after the Department has decided the matter.

[4] AT&T oversimplifies and mischaracterizes the process of providing facilities for services. AT&T claims that Verizon MA will declare facilities not available when copper facilities are in fact available (AT&T Motion, at 13, 19). However, the mere presence of copper facilities at a location does not mean that all services can be supported there. Copper facilities have limited function in supporting the high-speed services frequently requested by AT&T. It is a gross oversimplification for AT&T to claim that copper facilities "are in fact available" when they cannot support the services it requests.

(Phase I)). In the *Phase I Order*, the Department concluded that "wholesale provisioning problems do not constitute a non-price barrier to entry." *Phase I Order*, at 65.

In short, AT&T's Motion is nothing more than a rehashing of arguments previously rejected by the Department and an untimely and improper procedural effort to divert attention from Verizon MA's Compliance Filing, which is now ripe for a Department decision.

E. Contrary to AT&T's Assertion, the Phase I Order Did Not Require Reductions in Intrastate Special Access Charges.

AT&T argues that Verizon MA failed to comply with the *Phase I Order* because Verizon MA did not reduce its Special Access rates to UNE levels (AT&T Motion, at 32). AT&T's argument reflects a fundamental misreading of the Department's *Phase I Order.* The *Phase I Order* requires that Intrastate Special Access be priced on a UNE basis only if Verizon MA elects to go forward with the Department's condition on the implementation of Private Line pricing flexibility. Verizon MA has elected not to seek pricing flexibility for its Private Line service, and therefore, has complied fully with the Department's *Phase I Order.* In any event, this same issue already has been addressed by the parties (*see e.g.*, Verizon MA Reply Comments, at 10-12), and the Department will determine the matter. Certainly, no further record on this issue is required.

II. CONCLUSION

As described above, AT&T's Motion is an abuse of process that is without merit and should be rejected by the Department. AT&T's Motion directly conflicts not only with the Department's explicit findings concerning the same issues, but also the Department's established procedural framework for the case.

Respectfully submitted,

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